3

NO. 552

FILED

MAR 15 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

STATE OF IDAHO, *Petitioner*

vs.

DAVID ARTHUR

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

---

PETITIONER'S REPLY BRIEF

ROBERT E. SMYLIE
Attorney General of Idaho

J. R. SMEAD
Assistant Attorney General,
Boise, Idaho

Attorneys for Petitioner

INDEX

	Page
Reference to Petition for Writ	1, 2
Argument:	
Addressed to Respondent's Brief, p. 2	2
Addressed to Respondent's Brief, pp. 3-8	2, 3, 4
Addressed to Respondent's Brief, p. 9	2, 3
Addressed to Respondent's Brief, p. 11	4
Addressed to Respondent's Brief, p. 10	4, 5, 6, 7, 8
Addressed to Respondent's Brief, p. 12	8, 9
Addressed to Respondent's Brief, pp. 7 and 8	9, 10

CITATIONS

Cases:	Page
Armstrong v. Armstrong, 193 P.2d 495	5
Chicago, M. & St. P. Ry. Co. of Idaho vs. U. S., 218 Fed. 288	7
Derosia v. Firland, 76 Atl. 153	5
Dooly v. Gates, 22 S.E.2d 730	5
In re Race Horse, 70 Fed. 598	3
In re Wehr's Will, 18 N.W.2d 709	5
Jones v. Mutual Creamery Co., 17 P.2d 256	5
Kane v. McCown, 55 Mo. 181	6
Parsons v. Fed. Realty Corp., 143 So. 912	5
Six Companies v. Joint Highway District, 311 U.S. 180 85 L.Ed. 114	6
Skeem v. U. S., 273 Fed. 93	7
Sol Loui v. U. S., 274 Fed. 47	7
State v. Lott, 21 Idaho 646	7
Tulee v. Washington, 315 U. S. 681, 86 L.Ed. 1115	3
U. S. v. Nez Perce County, 267 Fed. 495	7
U. S. v. Nice, 241 U. S. 591	7
Vane v. U. S., 254 Fed. 28 and 32	7

CITATIONS (Continued)

Ward v. Race Horse, 315 U. S. 681, 62 Sup. Ct. 862, 86 L.Ed. 1115 3

Woodward v. Pacific Fr. and Prod. Co., 17 P.2d 256 5

Organic and Admission Acts:

Idaho, 12 Stat. 808, Ch. 117; 26 Stat. 215 2

Wyoming, 15 Stat. 178; 26 Stat. 222 2

Idaho Code, Vol. I., pp. 28-30 3

Idaho Constitution, Art. 21, Sec. 19 8

Texts:

38 C.J.S., Game, Sec. 15, p. 19 8

II Kappler 706 and 740 9

Record of Long Council proceedings 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

STATE OF IDAHO, *Petitioner*

vs.

DAVID ARTHUR

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

---

PETITIONER'S REPLY BRIEF

We believe it unnecessary again to summarize the Record which is now before this Honorable Court, since that is done fully in our opening brief.

We file this Reply Brief, not because Respondent's Brief answers the questions submitted, nor yet the opening Brief of Petitioner herein (for it does not), but because we believe it appropriate and indeed our duty to keep the briefing record straight. There are so many misstatements of fact and unsupported conclusions in the adversary brief that we believe it should not go unchallenged.

ARGUMENT

As to the questions presented to the state court, the paragraph, "Questions Presented", in Respondent's Brief, page 2, falls so far short of the Record, even the state court's opinion, that we refer this Honorable Court to our Petition for the Writ, pages 15 to 34.

The state court, contrary to Respondent's statement on page 3 of his brief, had before it more than two basic questions. A statement to the contrary does not alter the Record facts. That the numerous and successive Acts of Congress which are cited and summarized in our opening Brief together with appropriate decisions are nowhere even mentioned by the state court, although twice presented to them, speaks in no uncertain language. When Respondent states (his Brief, page 9) that "it (the state court) decided that Congress had not exercised that power" (to legislate in conflict with the treaty provisions) he asserts that which is outstandingly conspicuous by its absence. In fact, he also has not discussed either the Forest laws, the Regulations, or the decisions.

Of the provisions of the *Idaho Admission Act*, 26 *Stat.* 215, he omits the unquestionable truth that both the Organic Acts which respectively created the Territories of Idaho and Wyoming (*Idaho*, 12 Stat. 808, *Wyoming*, 15 Stat. 178) and the Acts which admitted those Territories to statehood (*Idaho*, 26 Stat. 215, *Wyoming*, 26 Stat. 222) are substantially and indeed almost identically the same. Each Organic Act recognized and forbade the infringement upon treaty and other rights of the Indian people (Idaho, Secs. 1 and 17); on the other hand, both Admission Acts were entirely silent concerning any of

those matters. As this Court said in *Ward v. Race Horse*, 163 *U.S.* 504:

> "The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians is given increased significance by the fact that Congress in creating the territory expressly reserved such rights. * * * * * To refer to the limitation contained in the territorial act and disregard the terms of the enabling act would be to disregard and obliterate the express will of Congress."

Yet Respondent has attempted doing just that.

The "compiler's note" following Section 1 of the Organic Act of the Territory of Idaho, in 1863, which is found in *Idaho Code, Vol.* 1, *pages* 28-30, treats at length of Oregon, Washington, Idaho and Wyoming, is very interesting and illuminating, and contains all the proper citations of the Congressional Acts. The Idaho court waved the *Race Horse* case aside by saying that it had been "rejected" and "repudiated" by this Court: we are still waiting for somebody to point out to us where and when that occurred. While we do not "rely principally" upon it, as now assumptively stated by Respondent although the contrary is definitely shown in our opening brief, p. 42, it seems quite plainly to be an established precedent of decision in this Honorable Court, and is important because it dealt specifically with the killing of game out of the season permitted by the law of the State of Wyoming (70 Fed. 598) which is the very thing that occurred in the present case. Moreover, Respondent again misstates (Brief, page 11) that the footnotes which are a part of the decision of this Court in the *Tulee* case, cite only the

Kennedy-Becker and the *Winans* cases. There cited are also the *Race Horse, Geer* and *Patsone* cases (all the foregoing are cited in our opening brief) in support of this Court's holding (*not* "remark") that "the treaty leaves the state with powers to impose on Indians equally with all others restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish". That is precisely what the duly constituted authorities of Idaho are trying to do for the conservation of Idaho game. The case is found in 315 *U.S.* 681, 62 *Sup. Ct.* 862 and 86 *L.Ed.* 1115.

Respondent, still following in the footsteps of the Idaho court, is now attempting to "repudiate" the *Tulee* decision by calling it "dictum." When one looks at the decision as reported in 86 *L.Ed.* 1115, one finds the briefs in this Court summarized, and also finds by merely casual reading that the propositions which this Honorable Court considered and answered were very expressly and fully presented by counsel then appearing, especially by counsel who presently appears for Respondent. We believe that we have already cited in our opening Brief sufficient authority to do away with Respondent's insistence of "dictum," but there are so many other decisions that we cannot refrain from now calling attention to an exemplary group.

In Vermont the court stated:

> "The propositions of law there stated by the court were necessarily involved in the determination of the case, and consequently they are of the doctrine of the case for which the decision is authority."

Derosia v. Firland,
76 Atl. 153, 156.

The Georgia court in more recent years rendered a decision replete with *many* authorities:

Dooly v. Gates,
22 S.E.2d 730, 734.

Further, when there are a number of questions submitted, a ruling on any of which would dispose of the case, all may be considered and determined and "neither holding is dictum."

Parsons v. Federal Realty Corp. (Fla.),
143 So. 912, 920.

Armstrong v. Armstrong, (Cal.),
193 P.2d 495, 497-498.

Jones v. Mutual Creamery Co. (Utah),
17 P.2d 256, 258.

Woodward v. Pacific Fruit &
Produce Co., (Ore.),
106 P.2d 1043, 1045.

Under similar circumstances Wisconsin held that such holdings and decisions are not dictum but are a judicial act thereafter to be recognized as a binding decision.

In Re Wehr's Will,
18 N.W.2d 709, 714.

Long ago the Missouri court held that in such a case

the court may proceed to determine the points which the record presents, that this "is the most satisfactory to all paries concerned" and is not dictum.

> Kane v. McCown,
> 55 Mo. 181, 199.

In reviewing a California case of recent date, this court, in answer to the traditional and not infrequent attempt to confess and avoid precedent by a resort to alleged "dictum", said:

> "This part of the opinion of the court was its answer to appellant's insistence. * * * * What the court said as to this was a statement of the ground of its decision."

For expressly that reason it was held *not* dictum.

This would seem to apply most aptly to Respondent's present insistence that this court's answer to the disputed propositions of counsel in the *Tulee* case was dictum.

> Six Companies of California
> v. Joint Highway District,
> 311 U.S. 180,
> 85 L.Ed. 114.

The adversary brief, page 10, complains that we have apparently overlooked the fact that *In Re Heff* "was expressly overruled" in *United States v. Nice,* 241 *U.S.* 591. Again, Respondent is mistaken, and since his brief takes the liberty to attempt stating facts *dehors* the Record and thus make wholly unsupported assertions, we beg leave to exercise the privilege of correcting such statements. It was not "overlooked." The compositor of this brief has dealt in numerous ways with Indian treaties and federal law

throughout Idaho for the last 40 years, and for more than eight years, 1914-1922, devoted a large portion of his time and efforts to the enforcement of federal law. As a sample of credentials and in support of this statement, we call attention to the personnel of counsel in a few cases:

U. S. v. Nez Perce County,
267 Fed. 495;

Skeem, et al., v. U. S.,
273 Fed. 93;

Chicago M. & St. P. Ry. Co. of Idaho v. U.S.,
218 Fed. 288;

Sol Louie v. U.S.,
274 Fed. 47;

Vane v. U.S.,
254 Fed. 28 *and* 32.

He certainly knew that the federal courts had jurisdiction of violations of the Indian liquor laws, but he also knew that the *Nice* case dealt *only* with the sale of liquor, resulted in part from "many later enactments" following the Dawes Act; and it surely did not overrule or dispute the statement of historic facts and existing decisions of this court contained in the *Heff* case. Moreover, while the *Heff* case was quoted in the Idaho decision, *State v. Lott,* 21 *Idaho* 646, and for that reason pointed out by Petitioner, a reading of that case discloses readily that the *Heff* case was not at all necessary to support the decision. The net result of a consideration of all three of these cases is, that *both* the state and federal courts had jurisdiction

in matters arising under liquor laws, *after* the Nez Perce Reservation ceased to exist and the allotment to the individual Indians had been made. That, we submit, is cold comfort for Respondent in the instant case. See also Idaho Constitution, Art. 21, Sec. 19, ratified and confirmed by Congress, Admission Act, Sec. 1. Indian title to lands here considered was "extinguished" many years ago.

Continuing briefly, Petitioner said nothing about the State of Idaho *abrogating* a Nez Perce Treaty. Rather, if condensed into one question, as far as is possible, do the Nez Perce treaties and agreements, when viewed in the light of congressional enactments since 1855, the great change of conditions and status since 1855, Idaho's statehood, and the decisions of this Court from the beginning to the *Tulee* case in 1942, now *inhibit* the state's sovereign power to *regulate* the hunting and killing of game within its borders? Regulation is one thing, prohibition is something very different. Stated succinctly, a *license* to hunt creates a right to be exercised, the related provisions of law *regulate* its exercise. A hunting license is a franchise conferred by governmental authority to perform acts which, without the license, would be illegal; but, however the right to hunt is acquired, it can be exercised only in accordance with the substantive provisions of the related law governing times, places, bag limits and the like.

> 38 C.J.S., Game,
> Sec. 15 on page 19.

Herein we ultimately reach the seasonal regulations.

We are told (Brief, page 12) that hunting "still is today, to a large extent, a major source of food for the

Nez Perce Indians." Again, that is so far apart from the real facts, not to mention the Record, that it seems hardly necessary to answer it. To support it, one would have to go farther and show that the farms, ranches, stock-raising, educational facilities, adoption of vocations professional and otherwise, which have been owned, used and enjoyed by generation after generation of the Nez Perce Indians for 60 years, are so inconsequential as to be negligible. According to Respondent, the Nez Perce are still "unlettered" nomads. With that, we, from rather intimate knowledge, beg leave to differ.

Concerning interpreters in 1855: there was not one, but two. *Kappler, Vol II, page 706.* Respondents Brief, page 4, overlooked the facts. A reading of the record of proceedings in the Long Council reveals that one of the Nez Perce people there present made it known that they were highly pleased with the services of one of those interpreters *because he knew their language.* When one turns to the Blackfeet Treaty, to which the Nez Perces were parties, one finds that same interpreter, and again, another interpreter, *both* for the Nez Perces. *II Kappler, page 740.* Furthermore, the authentic record of the Long Council proceedings leaves no room for accusation of "technical" trickery.

Finally the state court (Brief, page 7) was speaking of land in 1855, not 1953. Moreover, the Nez Perce Indians lived first in the Territory of Oregon, then in Washington, before the 1855 Treaty was drawn. We have already pointed that out by reference to the "compiler's note." The adversary brief is again either short on geographical and historic knowledge or conveniently forgetful. Further, in 1855, while Texas and California were states, Texas was *south,* not west, of Missouri. It is still there. Also,

Iowa, Missouri and Arkansas were sovereign states of long standing in 1855, Oregon Territory was created in 1848, and in 1853 Washington Territory was created from a part of Oregon and included the whole of what is now Idaho. Assuredly, the whites could have, had and were settled and still settling on, holding, governing and controlling those lands before there were *any* treaties. The Nez Perces and other Indians in those Territories can hardly be assumed to have been so naively ignorant that they did not know at least that, as well as the existence of territorial government in conjunction with the federal government: and that was *before* there was *any* reservation. That is what brought about reservations. A reading of the record of the Long Council discussions and proceedings would seem to make this self-evident.

Incidentally, *U.S. v. Payne* says nothing about "implication" (Brief, P. 9). Importantly, the *Tulee* decision leaves nothing to "implication". It is couched in forthright, simple English.

Respectfully submitted,

ROBERT E. SMYLIE,
Attorney General of Idaho

J. R. SMEAD,
Assistant Attorney General
Boise, Idaho

Attorneys for Petitioner